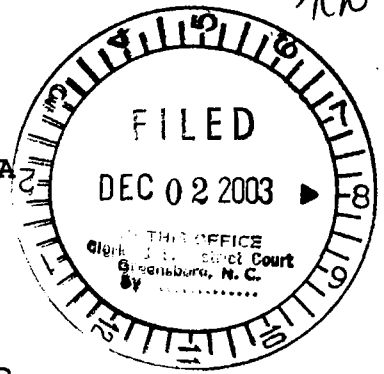


IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA



SANDRA FAYE THOMAS,

Plaintiff,

v.

GUY BARBER, III, et al.,

Defendants.

1:03CV1139

ORDER AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Sandra Thomas seeks to proceed in forma pauperis. However, it is not clear that she qualifies. Her application shows that she is married and that her spouse earns approximately \$1,800.00 per month. Plus, the family receives Social Security benefits of \$508.00 per month and Supplemental Security Income of \$64.00 per month, along with child support. However, it may be that one of the defendants is plaintiff's spouse. In any event, there are other problems with the complaint.

Because plaintiff seeks to proceed in forma pauperis, the Court must examine the complaint to see whether it fails to state a claim upon which relief may be granted, seeks monetary relief from a defendant who is immune from such relief, or is frivolous or malicious. 28 U.S.C. § 1915(e). For frivolous or malicious review, the Court looks to see whether the complaint raises an indisputably meritless legal theory or is founded upon clearly baseless factual contentions, such as fantastic or delusional scenarios. Neitzke v. Williams, 490 U.S. 319, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989). A plaintiff fails to state a claim when it appears certain that plaintiff cannot prove any set of facts which

would entitle him or her to relief. The Court must accept all well-pled allegations and review the complaint in a light most favorable to plaintiff. Mylan Laboratories, Inc. v. Matkari, 7 F.3d 1130, 1134 (4th Cir. 1993); cert. denied, 510 U.S. 1197, 114 S.Ct. 1307, 127 L.Ed.2d 658 (1994). Facts must be alleged with specificity. White v. White, 886 F.2d 721 (4th Cir. 1989). The Court may anticipate affirmative defenses which are clear on the face of the complaint. Todd v. Baskerville, 712 F.2d 70 (4th Cir. 1983); Nasim v. Warden, Md. House of Correction, 64 F.3d 951, 954 (4th Cir. 1995) (en banc), cert. denied, 516 U.S. 1177, 116 S.Ct. 1273, 134 L.Ed.2d 219 (1996) (court may apply common sense and reject fantastic allegations and/or rebut them with judicially noticed facts).

Plaintiff fails to state a cause for federal jurisdiction. She states that jurisdiction is based on mail fraud. It appears she claims defendants filled out a fictitious change of address card in an attempt to divert her mail. However, mail fraud would be a criminal matter charged by the United States Attorney to prosecute and plaintiff fails to identify a federal civil cause of action. Moreover, a jurisdictional amount has not been pled. In fact, it appears that plaintiff's real cause of action is based on the defendants filing false civil and/or criminal charges, verbally abusing plaintiff, and having her in and out of court. These are state court causes of action and must be brought in state court, unless some basis for federal jurisdiction is stated. Even if the court were to construe the complaint as alleging diversity of

citizenship jurisdiction, the amount in controversy is not stated. Also, venue appears to be improper.

The defendants appear not to be located in this district, but rather in the District of Virginia. Plaintiff will have to bring her cause of action in Virginia, not in North Carolina. Venue does not exist in this court. 28 U.S.C. § 1391.

For all of the above reasons, plaintiff is not entitled to proceed as a pauper. If plaintiff wants to pursue this action, she will have to pay the filing fee and serve the defendants. However, if venue is not proper in this district, the matter could well be transferred to another district in any event.

IT IS THEREFORE ORDERED that plaintiff is allowed to proceed in forma pauperis solely for the purpose of filing this Order and Recommendation but is otherwise denied.

IT IS RECOMMENDED that plaintiff's request to proceed as a pauper be denied for failing to assert a federal cause of action with venue in this district and that plaintiff's complaint be dismissed without prejudice to her filing it in an appropriate court.


United States Magistrate Judge

December 2nd, 2003